THE

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THE WAKF BILL.

The Mussulman Wakf Validating Bill introduced into the Imperial Legislative Council, at its last spring session, aims at removing the doubts which have arisen regarding the validity of Wakfs and to define the limits within which such Wakfs may legally be created. The decision of the Privy Council in 22 Cal. and the consequent unsettlement in the law of Wakfs are the causes which have led the Muhamadan subjects of British India to seek for legislative interference in the matter. That decision delivered by no less a Judge than Lord Hobhouse holds that no Wakf could be established, under the Muhamadan Law, where the gift to the poor is illusory from the smallness of the amount, its uncertainty or remoteness; and that family settlements in perpetuity being contrary to the Muhamadan Law such dispositions cannot be rendered legal merely by the addition of the words that they are made as Wakf or for the benefit of the poor, where no substantial benefit is conferred on the latter. The decision, it is contended, does not fix any limit of time, but simply says 'some period of time' or other'; nor does it define what is substantial dedication. It is urged that it not only introduces the greatest uncertainty in the law, but that it is also opposed to the fundamental principles of Islamic Jurisprudence. Ever since that judgment was pronounced, Wakfs in this country have been trailed and hunted down, that branch of the Mussulman law which relates to family settlements has been paralysed, and Muhamadan families are being broken up and dismembered. These, it is graphically said, are the practical results of the decision.

No doubt, it is not uncommon to find Privy Council decisions running counter to the law as observed by this or that community in India, and the Legislature, on their representation, stepping in to set the law aright. [The Impartible Estates Act is an instance in point.] In this case we are not prepared to charge the decision with introducing uncertainty and indefiniteness. This is pointed out by Benson and Rahim, JJ., in 1911 M. W. N. But it should, all the same, be admitted that the broad proposition laid down by the Privy Council, *viz.*, that family settlements are opposed to the Muhamadan Law cannot, as we briefly show below, be substantiated.

How, then, does the Hon'ble Mr. Jinnah propose to remedy the evil caused by this decision? His is a simple cure. He would empower all persons professing the Mussalman faith, not being a minor or of unsound mind, to create a Wakf for the maintenance and support, wholly or partially, of his family, his children and descendants, provided that the ultimate reversion is expressly or impliedly reserved for the poor or for some religious, pious or charitable purpose of a permanent nature. The primary aim is to benefit the family, while the settlor would

not grudge a disposition to the poor should his descendants lineal and collateral be extinct. Such a position, Muhamadan lawyers urge, is not opposed to the law enunciated by the Prophet. For, in the Koran, we read "They will ask thee what shall we bestow (in alms). *Answer*, the goods which ye bestow, let it be given to parents, kindred and orphans, and the poor and the strangers." And we are assured that whenever the Holy Koran enjoins for charities, the first word used is *qurba*, *i. e.*, one's relations. In the Madras case referred to above their lordships also observe that the words *wakf* and *sadaquah* in their different grammatical forms are used merely because these phrases are in common vogue as denoting ideas of perpetuity and a general intention to give to charity. "The validity of wakfs for the donor's family is established by an absolute unanimity of opinion among all the schools of law, Sunni as well as Shiah, and among the jurists of each school. Hence this may well be regarded as a clear case of *Ijma* based on unanimity of opinion, which, in itself, as we have seen, is an authoritative source of law apart from the texts or the reasons on which it may be founded" says Justice Abdur Rahim in his book on 'Muhamadan Jurisprudence.' In 20 Cal. 116 Justice Ameer Ali has arranged all the texts and precepts in favour of this position and has established that in Muhamadan law the term wakf included settlement on the dedicator himself and on his children. The question, therefore, is whether such a tying up of property, although allowed under the Mussalman law and proposed in the Bill in consonance thereto, is opposed to public policy. "*His family children*, and *descendents*" (S. 3 of the Bill) are, in our opinion, terms which are dangerously wide, and which practically render the property inalienable for generations. It is one thing to sympathise with the objects of the Bill ; but it is quite another to approve of the unlimited power to settle property which takes no note whatever of the rule of perpetuity. General objections against such settlements can be urged. "It would be doing wrong to the great law-giver to suppose that he is thereby commending gifts for which the donor exercises no self-denial ; in which he takes back with one hand what he appears to put away with the other ; which are to form the centre of attraction for accumulations of income and further accessions of family property ; which carefully protect so-called managers from being called to account ; which seek to give to the donors and their family the enjoyment of property free from all liability to creditors ; and which do not seek the benefit of others beyond the use of empty words" *Per Lord Hobhouse.* But our point is that it has always been thought necessary to fix some period as the latest at which an estate limited by way of executory use should be allowed to vest [Stephen's Commentaries, Vol. I., p. 534]. For, as the learned commentator observes "as all such arrangements, while they continue in force, tie up the property, or in other words, prevent its free alienation, they have been considered in later times with reasonable jealousy and dislike as tending to embarrass the transactions of mankind, and to frustrate the purposes for which property was first established." Why should this Bill be allowed to ignore this wholesome limitation ? Under the English law, every limitation is prohibited which does not vest till after the expiration of

a life or lives in being when the limitation is created, or within twenty-one years afterwards; and where gestation exists, the period of gestation [*Encyc of the Laws of Eng. Vol. XIII, p.* 289]. The *Thellusan Act* prohibits accumulations for a longer period than the life of the settlor or 21 years from the death of any such settlor ; and the *Accumulations Act of* 1892 forbids, beyond a certain time, "accumulation for the purchase of land only." The Indian Legislature has, also condemned all attempts to shackle the free disposition, enjoyment or circulation of property. And the rule against perpetuities has been embodied in Sec. 14 of the Transfer of Property Act and Sec. 101 of the Indian Succession Act. Indeed the Hon'ble Mr. Richards has said in the council, last year, in reply to a question on the matter under consideration "that the Government are ready at any time to accord their fullest consideration to any specific proposals for legislation directed with the object of securing family settlements *of a limited nature.*" Certainly, the Hon'ble Mover does not propose to limit or qualify the duration of the settlement. But we hope that the Bill will be so modified as not to ignore this will-recognised principle of law. We are decidedly of opinion that the check imposed by the decision of the Privy Council should be relaxed. But at the same time we are opposed to any proposal which sets at naught the fundamental principles of natural law and interests of the commonwealth.

THE WEEK'S CASES.

3rd October, 1911.

Sundara Iyer and Phillips, JJ.

C M. A. 75 of 1910.

A suit by a daughter for a declaration that an arrangement entered into by her mother with her father's brother's son is not binding upon her reversionary right, for an injunction restraining them from interfering with her reversionary right, and for the appointment of a receiver is a suit for a declaration with consequential relief. The plaintiff having valued the injunction at Rs. 10 and the appointment of the receiver at Rs. 100 the suit was cognisable only by the District Munsif.

4th October, 1911

Abdur Rahim and Spencer, JJ.

C. M. A, 41 of 1910.

In executing decrees the executing court is not entitled to go behind the decree. Though a decree might have been wrongfully passed, the judgment-debtor ought to have appealed against it or got it set aside by review. When he allowed an erroneous decree to stand unreversed he cannot be heard to say in execution proceedings that the decree is obviously wrong. Where a decree directed the defendant to pay plaintiff a certain sum of money and held the mortgaged properties also liable for the same, their Lordships held that the decree was a personal decree executable against the defendant personally.

Sundara Iyer, J. and Ayling, J.

Cr. M. P. 44 of 1911.

In granting sanction to prosecute, the lower Court should satisfy itself that there is a reasonable probability of conviction. When there was no evidence on record to prove that a statement made by a witness

is false the High Court quashed the sanction granted by the lower Court to prosecute a witness for giving false evidence.

Spencer, J.

C. R. P. 871 of 1910.

In order that a sale in execution of a decree should be set aside under O. XXI r. 89, the deposit need not include the amounts of the decrees of the other decree-holders who have applied for rateable distribution but only the amount specified in the Proclamation as that due to the particular decree holder and this is so even under the new C. P. C.

5th October, 1911.

Sundara Iyer and Philips, JJ.

C. M. P. 1902 of 1911.

In an appeal, the High Court appointed one of the respondents as a receiver to act under the directions of the Sub-Judge Guntur. An application to the Sub-Judge was made by the Receiver for directions to file certain appeals. The Sub-Judge refused the permission. On behalf of the appellants the learned Advocate-General applied to the High Court to direct Receiver to file the appeals. The application was opposed by the respondents on the ground that the appeals would be futile. Their Lordships ordered the Receiver to seek the advice of the Advocate-General and take such action as he may be advised.

6th October, 1911.

Sundara Iyer, and Philips, JJ.

S. A. 478 of 1910.

A document called by the parties a promissory note and containing an unconditional undertaking to pay is a promissory note, though a document whose language does not explicitly contain such undertaking but only inferentially may not be a promissory note.

S. A. 477 of 1910.

A decision in a suit brought by a creditor against his debtor and the person who promises to pay the debt on behalf of the debtor that the latter has not paid the debt and made the original debtor liable, will estop the latter from contending that he paid the debt in a suit brought by the former against the latter for breach of covenant.

C. M. P. No. 1388 of 1910.

In order to declare a person a law tout under the Legal Practitioners Act, there must be evidence of general repute. That he acted so in isolated instances does not amount to evidence of such repute. It is not open to a Judge to act merely upon reports but upon evidence actually taken by him; where a Judge acts in his capacity as a District Judge he can confine the operation of the order only to Civil Courts.

S. A. No. 690 of 1910.

Where a person makes a settlement of his property on his two wives because he was without issue, the persons so taking under the settlement are not to be divested of their rights merely because an issue was subsequently born, unless the settlement itself contains an express condition to this effect.

Spencer, J.

Cr. R. C. 264 of 1911.

When a man taking bulls along a road was prevented from going with the bulls but was allowed to go by himself, held, there was no wrongful restraint of the person under section 339 of the Indian Penal Code.

Cr. R. C. 157 of 1911.

The High Court has no power to review its judgment in a Criminal case.